No. 77-1359

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

KIMBELL FOODS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a)[1] is reported at 557 F.2d 491. The opinion of the district court (Pet. App. 31a-51a) is reported at 401 F. Supp. 316.

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[1] "Pet. App." refers to the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on August 12, 1977. A timely petition for rehearing was denied on October 25, 1977 (Pet. App. 54a). On January 16, 1978, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including March 24, 1978. The petition was filed on that date and was granted on May 15, 1978 (App. 103). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a private lien that has not attached to the property and become choate before a federal lien attaches takes precedence over the federal lien.

STATEMENT

1. Respondent Kimbell Foods, Inc., filed this suit seeking a determination that its security interest in certain personal property of O.K. Super Markets, Inc., was prior and superior to a security interest in that property held by the Small Business Administration (SBA) and the Republic National Bank of Dallas (App. 15).

O.K. Super Markets, Inc. ("O.K."), a Dallas supermarket chain, became indebted to Kimbell Foods ("Kimbell"), a grocery wholesaler, as a result of inventory purchases. In August 1966, in order to help O.K. open a new store, Kimbell extended $20,000

credit to O.K. (App. 92). The debt was evidenced by a $20,000 promissory note and was secured by a Security Agreement and Financing Statement, filed with the Texas Secretary of State on September 2, 1966 (App. 9, 16-18). The collateral listed in the agreement included grocery store equipment and fixtures and "[a]ll goods, wares and merchandise and any and all additions or accessions thereto" (Pet. App. 2a; App. 9, 16-18). The agreement also contained a printed "dragnet" clause stating that "said security interest [is] also being given to secure the payment of all other indebtedness at any time hereafter owing by Debtor to Secured Party as well as the discharge of all obligations imposed upon Debtor hereunder" (App. 17).

In April and November, 1968, O.K. and Kimbell entered into two additional security agreements securing a single $27,000 note from O.K. This loan permitted O.K., which in the interim had changed to another supplier, to pay off that company and return to Kimbell (App. 92-94). These agreements, which were filed with the Texas Secretary of State on April 22 and November 21, 1968, also contained the dragnet clause securing future advances by Kimbell to O.K. (App. 19-21, 22-25).

During the latter part of 1968, O.K. sustained substantial losses because of a boycott (Pet. App. 34a; App. 62). O.K. therefore sought a $300,000 loan from the Republic National Bank of Dallas and applied to the SBA for a guarantee of the loan (Pet. App. 34a; App. 62). The Bank and the SBA tried

to get Kimbell and O.K.'s other creditors to guarantee portions of the loan, but were unsuccessful (Pet. App. 34a; App. 61-64).[2]

The Republic National Bank made the loan to O.K. on February 12, 1969. To secure O.K.'s note for $300,000 (which was designated by "SBA Loan No." and executed on an SBA form (App. 70-71)), O.K. executed a Security Agreement and Financing Statement in favor of the Bank (App. 67-69). The listed collateral, in which the Bank was given a security interest, was "[a]ll the debtor's machinery, fixtures, equipment and inventory, now existing or hereafter acquired, * * *" located at specified addresses (App. 67-68; see App. 47-48, 70-71; Pet. App. 34a). The financing statement covering the collateral was filed with the Texas Secretary of State on February 18, 1969 (App. 69).[3]

The SBA guaranteed 90 percent of the loan by Republic National Bank to O.K. (App. 48, 72-75).[4] It did so under the authority granted by Section 7(a)

[2] Kimbell, along with other major creditors of O.K., was asked to guarantee a *pro rata* share of the loan, based on the amount O.K. owed Kimbell, in return for payment in full of its account. Kimbell declined to do so, noting in an internal memorandum that it did not want to become contingently liable as a method of collecting debts and that "we want our account paid in full before we release our security" (App. 61-64).

[3] O.K. had previously delivered to Republic National Bank a financing statement covering collateral of a similar description (App. 26, 47), but there was no loan outstanding at that time.

[4] The Bank represented to the SBA that $200,000 of the loan would be used for debt payment and the remainder for "working capital," primarily to purchase inventory (App. 72).

of the Small Business Act, 72 Stat. 387, as amended, 15 U.S.C. 636(a) (App. 72). That provision authorizes loans to small business concerns where "financial assistance * * * is not otherwise available on reasonable terms from non-Federal sources" (15 U.S.C. 636(a)(1)).

In February 1969, when the SBA-guaranteed loan was executed, O.K. owed Kimbell $24,893.10 on the 1968 note, and proceeds from the loan were used to pay off this balance (Pet. App. 3a; App. 47, 48, 60).[5] O.K. at that time also owed Kimbell $18,390.93 on open account (App. 47, 76-84). O.K. subsequently made payments in excess of that amount, and the payments were credited against the oldest outstanding charges, thereby discharging this debt (Pet. App. 4a; App. 48-49, 76-84). O.K. continued to purchase from Kimbell, and, by January 15, 1971, there was a new balance of $18,258.57 on open account (Pet. App. 4a; App. 48-49, 76-84).

On January 15, 1971, Kimbell filed suit against O.K. in the 96th Judicial District Court of Tarrant County, Texas, to foreclose its security interest and recover the unpaid balance of $18,258.57, plus interest, contractual and statutory attorneys' fees, and costs (App. 11-12, 49). Shortly before, O.K. had defaulted on the SBA-guaranteed loan, and Republic National Bank, on December 30, 1970, had therefore assigned its security interest to the SBA (App. 49-50, 67, 70). On February 3, 1971, the SBA paid the

[5] There was no other promissory note between O.K. and Kimbell outstanding, the 1966 note having also been disposed of (Pet. App. 3a-4a and n.2; App. 47).

Bank 90 percent of O.K.'s outstanding indebtedness, which totaled $252,331.93 (App. 49-50, 67, 70). The assignment from the Bank to the SBA was filed with the Texas Secretary of State on January 21, 1971 (App. 50, 86).

In early February, 1971, O.K.'s creditors—the Bank, the SBA, and Kimbell—signed an agreement with O.K. providing that three of O.K.'s stores would be sold in bulk and the proceeds of the sale placed in escrow pending resolution of competing claims to the funds (App. 49).[6]

Approximately a year later, on February 4, 1972, the state court entered judgment for Kimbell Foods against O.K. Super Markets in the sum of $24,445.37 (Pet. App. 33a, n.2).[7]

2. Kimbell then filed the present suit in the United States District Court for the Northern District of Texas, pursuant to 28 U.S.C. 2410,[8] seeking a declaration that its security interest in O.K.'s property created a claim to the escrow fund superior to the claims of the Bank and the United States, and asking for

[6] As of September 15, 1975, $100,836.03 was held in escrow under the agreement (Pet. App. 53a).

[7] This amount consisted of $18,258.57 principal, $1,186.80 interest, and statutory attorneys' fees of $5,000 (Pet. App. 33a, n.2; App. 27-29).

[8] That statute provides that the United States may be named a party in suits brought to quiet title to property, or foreclose liens on property, in which the United States has an interest.

judgment against the Bank as custodian of the escrow fund.[9]

The district court held that the United States' security interest was superior (Pet. App. 36a-46a). The court concluded that, under the applicable federal law, a private lien is not entitled to priority over a federal lien unless the private lien has attached to the property, and all opportunities for judicially contesting the amount of the lien have been exhausted, before the federal lien attaches (Pet. App. 36a-42a). Because Kimbell's lien was not "choate" under this standard until February 1972, when Kimbell reduced its lien to judgment, it could not prevail over the security interest of the United States, whose priority dated from the filing of the security agreement by the Republic National Bank in February 1969 or, at the latest, from January 1971 when the Bank's assignment to the SBA was filed (Pet. App. 43a).[10]

3. The court of appeals reversed (Pet. App. 1a-29a). It agreed with the district court that the pri-

[9] The State of Texas and the City of Dallas intervened, claiming delinquent sales taxes and ad valorem taxes from the fund. The district court held that these claims did not qualify for the statutory priority over SBA liens that is provided to claims for state and local property taxes by 15 U.S.C. 646 (see n. 39, *infra*), and that the claimants had no rights against the escrow fund in any event (Pet. App. 46a-51a). The intervenors did not appeal.

[10] The court held alternatively that, as a matter of state contract law, the future-advances or "dragnet" clauses in the agreements securing O.K.'s notes to Kimbell in 1966 and 1968 did not secure the debts arising from the purchases subsequently made by O.K. on open account (Pet. App. 43a-46a).

ority of the federal lien is governed by federal law, but it rejected the "choateness" rule followed by the district court for determining when a lien is deemed to be perfected in competition with a federal lien (Pet. App. 13a-14a). It rejected the choateness rule because it thought that that rule, which was developed largely in connection with federal tax liens, should not be "extended" to situations where the federal government, instead of being the involuntary creditor of tax delinquents, voluntarily makes "garden-variety commercial loans or guaranties" (Pet. App. 17a-19a). The court viewed the collection of debts owed the SBA as "less central" to the proper functioning of the federal government than the collection of tax revenues (Pet. App. 18a-19a).

The court also concluded that adherence to the choateness doctrine would cause potential creditors of businesses eligible for Small Business Administration loans to "shun [those businesses] as anathema," thereby harming the companies that Congress wished to assist and undermining the policy expressed by Congress in establishing the SBA (Pet. App. 19a). Finally, the court observed that Congress in the Federal Tax Lien Act of 1966 "substantially pared the applicability of the choateness doctrine" to tax liens, and reasoned that "logical symmetry" required that the doctrine should not be applied to federal contractual liens (Pet. App. 20a-22a).[11]

[11] The court of appeals also rejected the district court's alternate holding (Pet. App. 43a-46a; see p. 7, n. 10, *supra*) that Kimbell's lien could not have priority because the parties did not intend to cover future indebtedness for inventory purchases under the dragnet clauses of the 1966 and 1968 security agreements. The court of appeals held that under Texas law, "a further extension of credit to the debtor by the lender is deemed future indebtedness reasonably contemplated by the parties when they execute a future advance clause" (Pet. App. 4a-10a). It also concluded that the SBA, standing in the shoes of the Bank, did not have priority on other theories under state law (Pet. App. 10a-13a). We do not present these questions of state law for decision by this Court.

The court of appeals then fashioned a new federal rule for determining priorities. It accepted the established federal rule that the lien "first in time is first in right."[12] But, in place of the choateness test for determining when a non-federal lien arises, it held that a lien that meets the standards of the Uniform Commercial Code (U.C.C.) qualifies to compete for "first in time" with a federal lien (Pet. App. 24a-26a).

The court applied a separate analysis, however, to the question whether the future-advances clauses in the 1966 and 1968 security agreements between O.K. and Kimbell gave the advances made by Kimbell from 1969 to 1971 a security interest with a priority dating back to the 1966 and 1968 agreements. The court considered that the SBA's lien attached when the Republic National Bank's lien arose in February 1969, so that the subsequent advances by Kimbell

[12] The Fifth Circuit has subsequently decided to abandon the "first in time, first in right" rule, at least in the case of mechanics' liens. *United States* v. *Crittenden*, 563 F.2d 678. The United States has filed a petition for a writ of certiorari in *Crittenden* (No. 77-1644). (We have furnished a copy of that petition to counsel for respondents.)

would have priority only if they related back to the dates of the 1966 and 1968 agreements (Pet. App. 26a). Texas law under the U.C.C. would allow relation-back, the court concluded (Pet. App. 12a-13a, 27a), but before the U.C.C., state courts had applied at least three rules concerning whether an optional future advance would relate back to take priority from the date of the original security agreement. Some held that such advances did not relate back, others allowed relation-back unless the advancing creditor had actual notice of the intervening lien, and still others allowed relation-back in all cases (Pet. App. 26a-27a). The court rejected the first of these three rules and found it unnecessary to choose between the last two, since under either of them the court believed that Kimbell's lien for the subsequent advances would relate back to the prior security agreements (Pet. App. 27a-28a).

SUMMARY OF ARGUMENT

This case involves the relative priority of a federal contractual lien, securing a loan guaranteed by a federal agency, and a private lien securing optional advances that were made after the federal loan guarantee was given and the federal lien attached. We contend that because the private lien securing the advances was not specific and perfected—was not "choate"—when the federal lien attached, the federal lien was "first in time" and takes precedence over the subsequently perfected private lien.

1. As the court below recognized, federal law governs the relative priority of federal liens, including the Small Business Administration lien at issue here. In a series of cases involving federal tax liens, this Court has fashioned rules to determine the relative standing of federal liens and competing liens where no Act of Congress does so. Those rules are that the lien "first in time is first in right," and that the time a non-federal lien arises for the purpose of this competition is the time it becomes "choate." A lien is choate when the identity of the lienor, the property subject to the lien, and the amount of the lien are established. *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47; *United States* v. *City of New Britain*, 347 U.S. 81.

The reasons given by this Court for applying the first-in-time and choateness rules in the context of federal tax liens apply with equal force in the context of federal contractual liens. It is equally important to insure the prompt and certain collection of federal revenues whether those revenues arise from taxes or from the payment of contractual debts due the federal government. A dollar received in the Treasury from one source is as useful as a dollar received from the other. This Court's decisions interpreting the federal government's priority under the insolvency statute (R.S. 3466, now 31 U.S.C. 191), where the choateness test originated, have applied the test equally to tax debts and contractual debts. Recovery on loans and guarantees is particularly important to the congressional scheme for the

Small Business Administration, since amounts recovered go into a revolving fund in the Treasury that serves as the source of new loans and guarantees.

A second reason the Court has cited for applying the choateness rule with respect to tax liens is that "[o]therwise, a State could affect the standing of federal liens, contrary to established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." *United States* v. *City of New Britain*, *supra*, 347 U.S. at 86. The Court thus recognized that state law is not free to defeat a vested federal property interest, and that some federal test is needed to determine the "time" of a competing lien for the purpose of deciding which lien is "first in time." The same is true with respect to federal contractual liens.

2. Recognizing these considerations, the lower federal courts have proceeded to apply in connection with federal contractual liens the rules that this Court developed in connection with federal tax liens. Prior to enactment of the Federal Tax Lien Act of 1966—which limits the choateness doctrine in the context of federal tax liens—all five of the courts of appeals that considered the question agreed that the rules of first-in-time and choateness were applicable in connection with federal contractual liens. Since enactment of the Federal Tax Lien Act of 1966, at least four courts of appeals have reached the same conclusion, rejecting the argument that that Act has any

bearing on the relative priority of federal non-tax liens.

But the court below, together with the Ninth Circuit, has disagreed. The Fifth Circuit has concluded that the Federal Tax Lien Act of 1966, by modifying the choateness doctrine with respect to federal tax liens, impels the federal courts to abandon that doctrine with respect to federal non-tax liens.

This conclusion is erroneous. In passing the 1966 Act, Congress deliberated and acted only with respect to tax liens, adopting detailed rules governing the relative standing of federal tax liens as against specific categories of competing liens. Nothing in the content or background of the Act suggests any intent to affect the priorities of other kinds of federal liens, particularly on a wholesale and undifferentiated basis. There is, in fact, specific evidence of an intent to leave such questions "to another day." Moreover, in the 1958 amendment to the Small Business Act, Congress focused specifically on the priority of contractual liens held by the Small Business Administration, and diminished those priorities in only a precise and limited way.

3. The additional "policy reasons" given by the court below for rejecting the choateness rule do not withstand scrutiny. The Small Business Administration is not the equivalent of an ordinary "commercial lender." Government loans and guarantees are provided for reasons of national policy, not to make a profit. Loans and guarantees of the Small

Business Administration, like most federal financial assistance, are provided only if commercial credit is not available on reasonable terms. Far from "enter[ing] the commercial credit scheme" with the same "opportunity to evaluate the credit risks" as a private lender (Pet. App. 18A), the government enters only where private lenders do not go. And the choateness rule provides appropriate protection for government loans where the government is the lender of last resort.

4. Stability of legal rules is especially important in commercial law, where "presumably, individuals may have arranged their affairs in reliance on the expected stability of decision." *Monell* v. *Department of Social Services*, No. 75-1914, decided June 6, 1978, slip op. 39. The court below lacked justification for overthrowing the settled law that the courts of appeals had developed concerning the relative priority of federal contractual liens. Indeed, when the Small Business Administration entered into the loan guarantee whose priority is at issue here, the Fifth Circuit itself appeared to follow what was then the unanimous rule in the courts of appeals. The federal government and other parties stand to lose substantial sums, not only in this case but in hundreds of others, if their justified reliance on the choateness doctrine and the first-in-time rule proves to have been incorrect.

5. Moreover, in contrast to the coherent and well-established body of precedent that the court of appeals rejected, the new priority rules it has set out to develop on a case-by-case basis would be virtually

impossible to predict and rely on. The unpredictability of such judicial law-making in this area is well illustrated by the Fifth Circuit's process of choosing the legal rules it would apply in determining the priority of the private lien at issue in this case—and by the questions that the court expressly left open "for another day."

Given the uncertainties arising from any attempt to develop new priority rules through litigation, it is preferable, as other courts of appeals have recognized, to leave such a task to Congress. Congress can consider and determine the relative merits of various categories of federal contractual liens and various categories of competing liens. Congress can modify the choateness rule, if so advised, in a way that assures national uniformity and predictability; and Congress can make the new rules prospective only, if that is considered desirable to protect justified reliance on past rules. Moreover, if a decision is to be made to diminish federal property interests and relinquish federal revenues, in the asserted interest of fairness to competing lienors, Congress should make that decision. Until Congress acts, the first-in-time and choateness rules, which have proved clear and workable and have provided appropriate protection for federal liens, should be applied by this Court with respect to federal contractual liens as they were with respect to federal tax liens.

6. Applying those rules to this case, the lien of the Small Business Administration arising from its guarantee of the loan by the Republic National Bank

takes precedence over the lien of Kimbell Foods for its optional future advances. The court of appeals correctly ruled that the SBA's lien attached in February 1969, when the Bank's security interest was recorded; and at that time Kimbell's lien for the future advances was inchoate, since the advances had not yet been made. But even if the SBA's lien did not attach until January 1971, when the note was assigned to the SBA by the Bank and this assignment was recorded, the SBA's lien is still senior; for Kimbell's lien did not become choate until February 1972, when it was reduced to judgment in the state court.

ARGUMENT

I. THE DOCTRINES DEVELOPED BY THIS COURT TO DETERMINE LIEN PRIORITIES IN THE CONTEXTS OF THE INSOLVENCY STATUTE AND FEDERAL TAX LIENS ARE APPLICABLE IN THE CONTEXT OF FEDERAL CONTRACTUAL LIENS

A. This Court Has Framed Principles For Determining the Priority of Federal Liens in the Absence of Statutes Setting Priorities

The Small Business Administration (SBA) is authorized to make or guarantee loans to small-business concerns, provided that "the financial assistance applied for is not otherwise available on reasonable terms from non-Federal sources." 72 Stat. 387, as amended, 15 U.S.C. 636(a)(1). The SBA's loans must be "of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. 636(a)(7). The priority of liens on real or personal property

acquired by the SBA to secure its loans is not established by federal statute, except in limited situations not presented here.[13] The relative priority of SBA liens is, however, clearly a question of federal law, as the court below recognized.[14] In these circumstances, "it is for the federal courts to fashion the governing rule of law according to their own standards." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367.

This Court has already fashioned a rule of priority for federal liens where no federal statute sets the priorities. It has done so in the context of federal tax liens. The priority rules for federal tax liens were derived by the Court from its cases construing the insolvency statute, 31 U.S.C. 191 (R.S. 3466). That statute, which has been in effect in essentially its present form since 1797, provides that "[w]henever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied." The statute serves a public policy of "secur[ing] an adequate revenue to sustain the public burthens and discharge the public debts,"

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[13] See 15 U.S.C. 646 and discussion *infra*, pp. 33-37.

[14] Pet. App. 13a and n.9. "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366. The "titles or liens" created in the course of exercising these constitutional functions "present questions of federal law not controlled by the law of any State." *United States* v. *County of Allegheny*, 322 U.S. 174, 183. See also *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 49; *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580; *United States* v. *Gish*, 559 F.2d 572 (C.A. 9), certiorari denied, April 24, 1978 (No. 77-1191).

and the priority it gives the government has been liberally construed to that end. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35; *United States* v. *Moore*, 423 U.S. 77, 81-82.

The government's priority under the insolvency statute cannot attach to property that did not belong to the debtor on the date of insolvency—for example, because of a *bona fide* conveyance by the debtor before that date. *United States* v. *Knott*, 298 U.S. 544, 549; *Conard* v. *Atlantic Isurance Co.*, 1 Pet. 386. Consequently, in a series of cases stretching back to *Thelusson* v. *Smith*, 2 Wheat. 396, this Court has considered whether non-federal liens operated to divest the debtor of his property and thus to preclude the government's claim. In each case, the Court has held that the liens were not sufficiently specific and perfected on the relevant date. Liens that were not specific in amount;[15] that lacked a known lienor;[16] that did not attach to specific property;[17] that were not immediately enforceable without judicial proceedings or were not reduced to the actual possession

[15] *New York* v. *Maclay*, 288 U.S. 290, 292-294; *United States* v. *Texas*, 314 U.S. 480, 487; *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 357-358.

[16] *United States* v. *Knott*, *supra*, 298 U.S. at 550-551.

[17] *United States* v. *Texas*, *supra*, 314 U.S. at 487; *United States* v. *Waddill, Holland & Flinn, Inc.*, *supra*, 323 U.S. at 358, 359-360; *Illinois* v. *Campbell*, 329 U.S. 362, 373-376.

of the lienor,[18] have all been held "inchoate" and thus incapable of ousting the priority claim of the United States under the insolvency statute.[19]

In 1950, this Court considered what the federal rule should be when a federal tax lien is competing for priority with a private or state lien, but the debtor is not insolvent. *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47. At that time, no federal statute determined the priority of federal tax liens.[20] The Court concluded that "a similar rule" to the one it had developed under the "kindred" insolvency statute must be applied:

> In cases involving a kindred matter, *i.e.*, the federal priority under R.S. § 3466, it has never

[18] *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 365-366; *United States* v. *Texas*, *supra*, 314 U.S. at 487-488.

[19] Because all these liens were held to be inchoate, the Court has never had to decide whether the priority given the United States by the insolvency statute can be overcome even by a prior lien that is specific and perfected. See *United States* v. *Gilbert Associates, Inc.*, *supra*, 345 U.S. at 365; *Illinois* v. *Campbell*, *supra*, 329 U.S. at 370 and cases cited; *United States* v. *Vermont*, 377 U.S. 351, 358 n.8.

[20] 26 U.S.C. (1952 ed.) 3672, 53 Stat. 449, did provide that the federal tax lien was not valid against certain categories of lienors—mortgagees, pledgees, purchasers, and judgment creditors—until notice of the tax lien was filed in the office specified by state law. See *United States* v. *Security Trust & Savings Bank*, *supra*, 340 U.S. at 51. This statute established the time when the federal lien attached, but did not govern the competition between a federal tax lien that had attached and rival liens.

In the 1966 Federal Tax Lien Act, 80 Stat. 1125, 26 U.S.C. 6323(a), Congress has now provided some specific priorities governing federal tax liens. See pp. 28-32, *infra*.

been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *Illinois* v. *Campbell*, [329 U.S. at 374]. If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. [340 U.S. at 51; footnote omitted.]

The Court accordingly held in *Security Trust* that a subsequent federal tax lien was superior to a prior but "inchoate" attachment lien, even though state law accorded the attachment lien superiority over later-arising interests. 340 U.S. at 48-51.

In succeeding cases, this Court held that the priority of federal tax liens was determined by the rule, "widely accepted and applied, in the absence of legislation to the contrary," that "'the first in time is the first in right.'" *United States* v. *City of New Britain*, 347 U.S. 81, 85.[21] And the Court reaffirmed the rule of *Security Trust* that "a competing lien must be choate in order to take priority over a later federal tax lien * * *." *United States* v. *Vermont*, 377 U.S. 351, 355; *United States* v. *City of New Britain*, *supra*, 347 U.S. at 86.

The Court also specified the criteria for determining when a non-federal lien is sufficiently specific and

[21] The Court concluded "that Congress had this cardinal rule in mind when it enacted [the statute creating the federal tax lien], a schedule of priority not being set forth therein." 347 U.S. at 86.

perfected, or "choate," to compete with the federal tax lien for first in time. In brief, this is so "when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States* v. *City of New Britain*, *supra*, 347 U.S. at 84; *United States* v. *Vermont*, *supra*, 377 U.S. at 358.

B. The Reasons Recognized by This Court for Applying the "First in Time" and "Choateness" Rules to Federal Tax Liens Are Equally Applicable to Federal Contractual Liens

In dealing with federal tax liens this Court has fashioned a federal rule, derived from the case law under the insolvency statute, that determines priorities on the basis of the "first in time" rule and the requirement that a non-federal lien be "choate" in order to compete for first in time. The reasons that led the Court to apply these doctrines to federal tax liens are equally applicable to federal contractual liens, including the SBA lien at issue in this case.

1. This Court applied the choateness requirement and the first-in-time rule to federal tax liens because it considered those rules necessary "to insure prompt and certain collection of taxes due the United States from tax delinquents * * *." *United States* v. *Security Trust & Savings Bank*, *supra*, 340 U.S. at 51. This purpose was nowhere explicit in the statute creating the federal tax lien, but the Court, invoking the analogy of the federal priority under the insolvency statute, had no difficulty in discerning it.

The choateness doctrine and the first-in-time rule are no less necessary to insure the collection of debts arising from federal loans and guarantees. The insolvency statute, under which the Court developed the choateness doctrine, makes no distinction between tax and contractual revenues. It applies to all situations in which the government is a creditor and the debtor an "insolvent"—situations involving contractual debts as well as tax debts. See *Price* v. *United States*, 269 U.S. 492, 501.[22] This is not surprising, since it is difficult to identify a material distinction between a dollar received from the collection of taxes and a dollar returned to the Treasury on repayment of a federal loan. Both are equally useful "to sustain the public burthens and discharge the public debts."

[22] The insolvency statute (R.S. 3466)—which "is almost as old as the Constitution, and its roots reach back even further into the English common law," *United States* v. *Moore*, *supra*, 423 U.S. at 80—thus stands against the suggestion of the court below (Pet. App. 18a-19a) that the collection of contractual debts owed the SBA and other federal agencies as a result of their programs is "less central to the proper functioning of the national government" than the collection of tax revenues. Here, as in its earlier statement that "[t]he collection of taxes is certainly more vital to the government's existence than the making of farm loans," *Connecticut Mutual Life Ins. Co.* v. *Carter*, 446 F.2d 136, 139, the Fifth Circuit is, at bottom, confusing the government's collection of revenues with its use of the collected revenues in governmental functions. Revenues are not collected to support "the government's existence" in the abstract, but to enable the performance of governmental services and functions; these include the making of loans by government lending agencies such as the Small Business Administration.

United States v. *State Bank of North Carolina*, *supra*, 6 Pet. at 35.

In the case of the Small Business Administration, Congress has left no doubt that, within the limits dictated by the remedial purposes of the statute, it wants the sums lent by the agency returned to the Treasury on termination of the loans. Congress required specifically that all loans made by the SBA be of "sound value or so secured as reasonably to assure repayment." 15 U.S.C. 636(a)(7). The repayment of loans and recovery of security interests are particularly important to the SBA's program, because amounts recovered are returned to a revolving fund in the Treasury that must serve as the source of new loans and guarantees, except to the extent that Congress provides additional appropriations. 15 U.S.C. 633(c).[23]

2. This Court's adoption of the first-in-time rule and the choateness doctrine in the context of tax liens stemmed also from a recognition that the states are not free to defeat a vested federal property interest. To safeguard the integrity of the federal lien, interests of rival creditors in the debtor's property must be scrutinized to assure that they were

[23] Inability of the Small Business Administration to realize on the security for its loans would have a substantial impact on its program. As of June 1978, the SBA reports that its outstanding direct loans and guarantees amounted to $9.6 billion and that at most times approximately $1.1 billion was in default, arrears, or liquidation. (In that month there were 11,997 loans in liquidation, involving $617,800,000. An additional 27,462 loans were delinquent, involving $520,700,000.)

specific and perfected before the federal lien attached. As the Court said in *United States* v. *City of New Britain*, *supra*, the choateness doctrine is necessary because "[o]therwise, a State could affect the standing of federal liens, contrary to established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." 347 U.S. at 86 (footnote omitted).[24]

To undercut federal property rights is to interfere with the constitutional functions of the federal government that give rise to those rights.[25] In the case of tax liens, "to give priority to an inchoate state lien perfected after the federal lien for taxes has arisen is an interference with the federal power to lay and collect taxes." Sarner, p. 24, n. 24, *supra*, 95 U.Pa. L. Rev. at 758.[26] The constitutional functions of the federal government are no less implicated in federal contractual liens that arise in the course of federal lending programs, such as the lien of the Small Business Administration at issue here.[27] Just as this Court applied the choateness requirement in the tax lien context to prevent a state from undercutting "the standing of federal liens * * *" (*United States* v. *City of New Britain*, *supra*, 347 U.S. at 86), the same need to protect federal property and federal programs requires adherence to that requirement here. Like a federal tax lien, the SBA lien is a federal property interest that cannot be impaired or superseded by later-attaching interests to which state law purports to give priority,[28] unless Congress so provides.

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[24] As the Court's statement suggests, some form of a choateness requirement is a necessary complement to the first-in-time rule. Otherwise, "by the mere *ipse dixit* in the state statute creating a lien date, the lien of the United States is lost even though everything necessary to be done to establish the state lien takes place after [the federal lien] has arisen." Sarner, *Correlation of Priority and Lien Rights in the Collection of Federal Taxes*, 95 U. Pa. L. Rev. 739, 758 (1947) (cited with approval in *United States* v. *City of New Britain*, *supra*, 347 U.S. at 86 n.9).

[25] Such interference is, of course, beyond a state's power. See, *e.g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316, 436 (state tax on national bank); *City of New Brunswick* v. *United States*, 276 U.S. 547 (state tax lien on federal mortgage); *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 470-471 (private lien on vessel owned by United States).

[26] "Hence it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision." *Michigan* v. *United States*, 317 U.S. 338, 340.

[27] *Cf. United States* v. *Roessling*, 280 F.2d 933, 936 (C.A. 5, 1960) (federal mortgage lien):

> No state or county can tax the property interests of the United States in the absence of congressional consent. There is no constitutional prohibition against a state or county assessing taxes against property on which the United States holds a lien on the basis of the full value of that property, but, in the absence of congressional consent, the state or county is without authority to enforce the collection of the taxes thus assessed so as to destroy the pre-existing federal lien. [Citations omitted.]

[28] This is true whether the state law purports to create the priority by way of relation-back or otherwise. With respect to state liens competing with federal tax liens, the Court has refused to apply "the long since rejected relation-back doctrine." *United States* v. *Pioneer American Insurance Co.*,

C. The Federal Tax Lien Act of 1966 Applies Only to Tax Liens And Provides No Basis for Abandoning the Clear And Until-Then Unanimous Federal Jurisprudence Concerning the Priority of Federal Non-Tax Liens

Following this Court's 1950 decision in *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, see pp. 19-20, *supra*, the lower federal courts proceeded to consider whether the rules applied there in determining the priority of federal tax liens were applicable to non-tax liens as well. Prior to enactment of the Federal Tax Lien Act of 1966 (80 Stat. 1125, as amended, 26 U.S.C. 6323), five courts of appeals considered the question, and all of them answered yes. The Third, Fifth, Seventh, Eighth, and Tenth Circuits agreed that the rules of first-in-time and choateness were no less applicable to federal contractual liens than they were to federal tax liens. *United States* v. *Oswald and Hess Co.*, 345 F.2d 886 (C.A. 3, 1965); *United States* v. *Roessling*, 280 F.2d 933 (C.A. 5, 1960); *United States* v. *County of Iowa*, 295 F.2d 257 (C.A. 7, 1961); *United States* v. *Latrobe Construction Co.*, 246 F.2d 357 (C.A. 8, 1957), certiorari denied, 355 U.S. 890; *Southwest Engine Co.* v. *United States*, 275 F.2d 106 (C.A. 10, 1960).[29]

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374 U.S. 84, 92 n. 11. See also *United States* v. *Security Trust & Savings Bank, supra*, 340 U.S. at 50.

[29] It was "settled law that prior to the Federal Tax Lien Act of 1966, both federal tax liens and federal mortgage liens took priority over all competing liens except those which became 'choate' before the federal lien attached." *Connecticut Mutual Life Insurance Co.* v. *Carter*, 446 F.2d 136, 141 (C.A. 5, 1971), certiorari denied, 404 U.S. 857 (Rives, J., dissenting; footnotes omitted).

Since enactment of the Federal Tax Lien Act of 1966, the courts of appeals for the First, Second, Seventh, and Tenth Circuits have reached the same conclusion, rejecting the argument that the Tax Lien Act has any bearing on the priority of federal non-tax liens. *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F.2d 217 (C.A. 1, 1978), petition for certiorari pending *sub nom. Hercoform Incorporated* v. *Chicago Title Insurance Company* (No. 77-1611); *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675 (C.A. 2, 1972), certiorari denied *sub nom. County of Nassau* v. *United States*, 412 U.S. 922; *Willow Creek Lumber Co., Inc.* v. *Porter County Plumbing & Heating, Inc.*, 572 F.2d 588 (C.A. 7, 1978); *T. H. Rogers Lumber Co.* v. *Apel*, 468 F.2d 14 (C.A. 10, 1972).[30] And the Fourth Circuit and the Court of Claims, in cases involving federal claims other than liens, have likewise rejected the argument that the effect of the Tax Lien Act goes beyond tax liens. *H. B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F.2d 156, 160 (C.A. 4, 1967) (*en banc*), certiorari denied, 390 U.S. 1025; *Aetna Insurance Co.* v. *United States*, 456 F.2d 773, 776-777 (Ct. Cl., 1972).

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[30] The two most recent of these decisions expressly decline to follow the decision of the court of appeals in this case. *Willow Creek Lumber Co., supra*, 572 F.2d at 590-591; *Chicago Title Insurance Co., supra*, 568 F.2d at 222.

However, two courts of appeals, the court below (Pet. App. 20a-23a)[31] and the Ninth Circuit,[32] have concluded that the Federal Tax Lien Act of 1966, which modified the choateness doctrine as applied to tax liens, requires the federal courts to abandon that doctrine as applied to federal non-tax liens.

In so concluding, the court below and the Ninth Circuit have misinterpreted Congress's intent. In addition, they have invoked "policy reasons" that are inadequate and have proposed new rules that would inject needless uncertainty and complexity into commercial affairs (see pp. 37-51, *infra*).

1. The court below reasoned that, in view of the Federal Tax Lien Act of 1966, "logical symmetry urges rejection of the SBA's efforts to extend the choateness doctrine" to SBA liens (Pet. App. 20a), and that "the Act's recognition that some state claims should have priority over federal tax liens is a strong policy argument against extending the choateness doctrine to deny priority to state claims" (Pet. App. 21a, n.12).[33] This reasoning purports to find in the

[31] See also *United States* v. *Crittenden*, 563 F.2d 678 (C.A. 5, 1977), petition for certiorari pending (No. 77-1644); *Connecticut Mutual Life Insurance Co.* v. *Carter*, 446 F.2d 136 (C.A. 5, 1971), certiorari denied, 404 U.S. 857.

[32] See *United States* v. *California-Oregon Plywood, Inc.*, 527 F.2d 687 (C.A. 9, 1975); *Ault* v. *United States* 432 F.2d 441 (C.A. 9, 1970), affirming *Ault* v. *Harris*, 317 F. Supp. 373 (D. Alaska).

[33] Similar reasoning was earlier relied on by the Fifth Circuit in *Connecticut Mutual Life Ins. Co.* v. *Carter, supra*, 446 F.2d at 139, and by the Ninth Circuit in *Ault* v. *Harris, supra*, 317 F. Supp. at 375-376, affirmed and opinion adopted, *Ault*

Tax Lien Act congressional guidance extending beyond the area of tax liens. No such guidance is there.

The Federal Tax Lien Act of 1966 (80 Stat. 1125) amended 26 U.S.C. 6323 by broadening the protection given creditors who have liens competing with the federal tax lien imposed by 26 U.S.C. 6321. Among other things, the Act added mechanics' liens to the class of liens protected against tax liens of which notice has not been filed (26 U.S.C. 6323(a)); added certain categories of liens to those given a "superpriority" effective even against a tax lien of which notice has been filed (26 U.S.C. 6323(b)); and provided priority for interests arising subsequent to the filing of notice of the tax lien if those interests are protected by local law and if they arise from specified types of financing agreements that cover the property in question and that were entered into before the filing of notice of the tax lien (26 U.S.C. 6323(c)).

The Act thus provides only limited exceptions to the choateness rule in the context of federal tax liens.[34] The House Report, after reciting the require-

v. *United States, supra*, 432 F.2d 441, and *United States* v. *California-Oregon Plywood, Inc., supra*, 527 F.2d at 689.

[34] For example, the Act does not protect mechanics' liens that arise before the lienors provide services or materials, even if these would be protected under state law against later-arising liens. 26 U.S.C. 6323(h)(2); Plumb, *Federal Tax Liens* 152 (3d ed. 1972). And the Act gives priority to future advances pursuant to a written commercial financing agreement only if they are made within 45 days of the filing of the tax lien and without notice of that filing. 26 U.S.C. 6323(c)(2)(A).

ments of that rule as established by this Court in *United States* v. *City of New Britain*, *supra*, noted that "[e]xcept as otherwise provided, subsection (a) of [the Act] retains this basic rule of Federal law." H.R. Rep. No. 1884, 89th Cong., 2d Sess. 35 (1966).[35]

The Act was concerned, as its title indicates and as both of the congressional committee reports confirm, only with federal tax liens. It was a "comprehensive revision and modernization of the provisions of the internal revenue laws concerned with the relationship of Federal tax liens to the interests of other creditors." S. Rep. No. 1708, 89th Cong., 2d Sess. 1 (1966); H.R. Rep. No. 1884, *supra*, at 1. Nothing in the text of the Act, the committee reports, or the debates suggests a congressional intention to provide guidance of any sort concerning the relative priorities of federal liens other than tax liens. See H.R. Rep. No. 1884, *supra*, *passim*; S. Rep. No. 1708, *supra*, *passim*; 112 Cong. Rec. 22209-22211, 22224-22235, 26476-26478, 28218-28219 (1966).[36]

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[35] The court below recognized that the Act did not abolish the choateness doctrine with respect to tax liens, but only "adjusted the application of the doctrine by recognizing the priority of certain state interests, essentially granting exceptions to the choateness doctrine" (Pet. App. 20a-21a, n.12). Thus, a court could achieve "logical symmetry" only by adopting the rules of the Tax Lien Act for use in all non-tax lien cases, not by abolishing the choateness doctrine and casting about for new rules of the court's own devising.

[36] Representative Mills, Chairman of the Committee on Ways and Means, in response to questioning, specifically disavowed any intention to affect bankruptcy priorities. 112 Cong. Rec. 22226 (1966).

The Act was based on a draft prepared by the American Bar Association's Special Committee on Federal Liens. A member of that committee has written:

> The mandate of the American Bar Association's Special Committee on Federal Liens was, as its name indicates, not limited to *tax* liens. Nevertheless, because of limitations of time and personnel, and the practical desirability of focusing its negotiations on one government department and one committee in each branch of Congress, the Special Committee's final proposals, and to a greater extent the legislation which evolved, dealt primarily with the tax situation, leaving to another day the extension of the reforms to other areas.

Plumb, *Federal Liens and Priorities—Agenda for the Next Decade*, 77 Yale L.J. 228, 285 (1967) (emphasis in original; footnotes omitted); see also 83 Reports of the American Bar Association 453 (1958); 84 Reports of the American Bar Association 645, 671-672 (1959).

The content and background of the Federal Tax Lien Act thus permit only one inference about the asserted impact of that Act on the previously established law concerning the priorities of federal non-tax liens. This is the inference drawn by the Second Circuit—in agreement with four other courts of appeals and the Court of Claims [37]—as follows:

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[37] See p. 27, *supra*. "We conclude from the foregoing discussion of the legislative history that Congress intended

> We are unable to conclude * * * that a Congressional enactment, carefully drawn, which affects the priority of federal *tax* liens leaves the courts free to disregard prior precedents and thus to broadly extend the scope of the statute's principle to other unspecified areas which, though somewhat analogous, were simply not addressed by the Congress.

United States v. *General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, 678-679 (C.A. 2), certiorari denied *sub nom. County of Nassau* v. *United States*, 412 U.S. 922 (emphasis in original).[38]

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in the Federal Tax Lien Act of 1966 to legislate only with respect to the priority accorded the Federal tax lien * * *." *Aetna Insurance Co.* v. *United States, supra*, 456 F.2d at 776-777.

[38] If Congress had considered the question, there are plenty of reasons why it might have decided that federal tax liens and non-tax liens should not be treated the same way. For example: "We cannot say that it is illogical for Congress to deem it desirable to retain a priority for money it loans, while relinquishing the priority for its tax liens, which represent no financial outlay. Whatever may be the merits of symmetry in these two quite distinct, if cognate, areas the argument seems more properly addressed to Congress than to this court." *H. B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank, supra*, 388 F.2d 156, 160 (C.A. 4, 1967) (Sobeloff, J.). "Government taxes are so certain that the President is recommending to the Congress that the Government share its revenues with the States and municipalities. It is not irrational for Congress to think that the Government can afford to relax in favor of private liens the protection heretofore afforded liens for taxes, but that the strict protection should remain in force as applied to the limited and specific appropriations made by Congress to federal lending agencies." *Connecticut Mutual Life Insurance Company* v. *Carter, supra*, 446 F.2d 136, 143 (Rives, J., dissenting).

2. Moreover, Congress in another enactment has dealt specifically with the priority of liens of the Small Business Administration and has limited that priority in only a particular way. This statute, 15 U.S.C. 646, enacted in 1958 (72 Stat. 396) as an amendment to the Small Business Act, expressly subordinates SBA liens to state and local liens for property taxes.[39]

The legislative history of 15 U.S.C. 646 supports the inference that Congress intended only this limited exception to the priority that SBA liens could otherwise claim by virtue of judicial decisions. The legislation was originally introduced by Senator Payne, with the purpose of establishing that "all tax liens * * * will take priority over SBA mortgage claims." 104 Cong. Rec. 2470 (1958). What Senator Payne's bill provided, however, was that "any debt due the Administration * * * shall not be entitled to

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[39] 15 U.S.C. 646 provides:

> Any interest held by the Administration in property, as security for a loan, shall be subordinate to any lien on such property for taxes due on the property to a State, or political subdivision thereof, in any case where such lien would, under applicable State law, be superior to such interest if such interest were held by any party other than the United States.

The statute does not apply to state and local taxes that are not levied on real property. See, *e.g.*, *Director of Revenue, State of Colorado* v. *United States*, 392 F.2d 307, 312 (C.A. 10) (sales and withholding taxes not covered); *United States* v. *Oswald and Hess Co., supra*, 345 F.2d at 888 (water and sewer charges not covered). See p. 7, n. 9, *supra*.

the priority available to the United States pursuant to section 3466 of the Revised Statutes (31 U.S.C. 191) [the insolvency statute]." *Ibid.* The Small Business Administration, in commenting to the Senate Committee on the proposed legislation, stated that it supported Senator Payne's objective but did not believe that the bill, as drafted, accomplished its aims. Letter from Wendell B. Barnes, Administrator, Small Business Administration, in Hearings before a Subcommittee of the Senate Committee on Banking and Currency, Credit Needs of Small Business, 85th Cong., 2d Sess. 553-554 (1958) ("Hearings"). The SBA proposed alternative language, which, with minor modifications, was adopted by the Senate Committee and became 15 U.S.C. 646.

The SBA told the Senate Committee that Senator Payne's bill, as drafted, was both too broad and too narrow. It was too broad because it would deprive the SBA of its priority under the insolvency statute not only against state and local tax liens, but against all competing liens. The SBA opposed this aspect of the bill because "we often find it necessary to assert that priority against creditors other than State or local taxing authorities," and "[i]n this manner, we have recovered large amounts of money which would otherwise have been lost to the Government." Hearings, *supra*, at 553.

On the other hand, the bill was too narrow because it removed the SBA's priority against state and local tax liens only in the context of the insolvency statute. It thus "offer[ed] little of practical value to

local taxing authorities," since "the real conflict between their rights and ours lies in areas which are not affected by the priority contained in [the insolvency statute]." *Ibid.*

The SBA stated that "[u]ntil recently," it had avoided such conflicts "by yielding to the demands of local tax authorities," since "[n]ormally their claims are small in relation to the total amounts involved and, in such cases, we considered it to be in the best interests of the Government to avoid the expense and delay entailed in litigating the matter." *Ibid.* Also, there was doubt whether the rule established by this Court in *United States* v. *City of New Britain, supra*—that "as between a Federal tax lien and a State or local tax lien, the lien which attaches first in point of time is the superior"—was applicable to SBA mortgage liens. Hearings, *supra*, at 553.

But in January 1958, the SBA continued, the Court of Appeals for the Third Circuit had held in *United States* v. *Ringwood Iron Mines, Inc.*, 251 F.2d 145, "that a mortgage lien held by the United States stands in the same position as a tax lien held by the United States * * *." Hearings, *supra*, at 554. In view of that decision, the SBA had "reluctantly concluded that we have a duty to insist upon the superiority of our mortgages in all cases where they are prior, in point of time, to State or local tax liens." *Ibid.* The SBA therefore endorsed the proposed legislation, in the form suggested by the SBA (and ultimately enacted), "[i]n order to eliminate this situa-

tion" and permit the SBA to return to its practice of yielding to state and local tax liens. *Ibid.*

The issue presented by the Payne bill, together with the SBA's comments on it, thus focused Congress's attention on the priority of SBA contractual liens. In amending the bill as suggested by the SBA, the Congress was aware of, and apparently accepted, the SBA's opposition to a bill that would deprive it of priority against all competing creditors, so far as the insolvency statute was concerned, and would thus disable it from "recover[ing] large amounts of money which would otherwise * * * [be] lost to the Government." Hearings, *supra*, at 553. To be sure, the original Payne bill would have had this effect only with respect to the insolvency statute. But Congress hardly would have been more agreeable to the even greater loss of federal revenues that would result from depriving the SBA of priority against all competing creditors in the more common situations that are not governed by that statute.

What Congress enacted was the carefully limited bill, as proposed by the SBA, depriving SBA liens of priority against only a narrow class of competing security interests—liens held for property taxes by state and local governments. This enactment, dealing specifically and precisely with the priority of Small Business Administration liens, further refutes the claim that by the Federal Tax Lien Act of 1966, which dealt with nothing but tax liens, Congress intended to upset in wholesale fashion the priorities of

SBA liens in particular or federal contractual liens generally.[40]

D. In Abandoning the Choateness Rule, The Fifth Circuit Has Upset Established Law Without Good Reason And Has Substituted New Rules That Are Uncertain and Unreliable

Prior to the Federal Tax Lien Act of 1966, it was "settled law" [41]—the unanimous view of the five Circuits that considered the question [42]—that both federal tax liens and federal contractual liens took priority over all competing liens except those that had become "choate" before the federal lien attached. The court below has held that the Federal Tax Lien Act of 1966, *sub silentio* and without specifics, gave the courts a license to revamp this established law of non-tax liens. In so holding, the court has not only erred in its interpretation of the congressional intent (see pp. 28-31, *supra*). The Fifth Circuit is also

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[40] Also, the SBA's submission in 1958 put Congress on notice that, as a result of a court of appeals decision applying the rule of *United States* v. *City of New Britain* (347 U.S. 81) to federal mortgage liens, the SBA considered that "a mortgage lien held by the United States stands in the same position as a tax lien held by the United States * * *." Hearings, *supra*, at 553-554. Although the SBA's discussion did not mention the choateness doctrine specifically, that doctrine is at the heart of the Court's decision in *New Britain*. See 347 U.S. at 84, 86-87; pp. 20-21, *supra*. Moreover, as the Court there recognized, some form of a choateness rule is a necessary corollary of the first-in-time rule, which the SBA did mention. See 347 U.S. at 86; p. 24 and n. 24, *supra;* Hearings, *supra*, at 555.

[41] See note 29, *supra*.

[42] See p. 26, *supra*.

wrong because it has scuttled the previously settled doctrine in an area of law where certainty should prevail, because the asserted policy reasons for its action are unfounded, and because the *ad hoc* rules it proposes to substitute are ill-considered, ill-defined, and unreliable.

1. If "in most matters it is more important that the applicable rule of law be settled than that it be settled right," as long as "correction can be had by legislation" (*Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (Brandeis, J., dissenting)), this is pre-eminently true in matters of commercial law. "Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future." *National Bank* v. *Whitney*, 103 U.S. 99, 102.

Although it had not been determined directly by this Court, the law governing the relative priority of federal contractual liens—consisting of the first-in-time rule and the choateness doctrine—was firmly established in the courts of appeals prior to the 1966

Act.[43] The Court of Appeals for the Fifth Circuit should have followed that established law, since " 'presumably, individuals may have arranged their affairs in reliance on the expected stability of decision.' " *Monell* v. *Department of Social Services*, No. 75-1914, decided June 6, 1978, slip op. 39 (dictum) (quoting *Monroe* v. *Pape*, 365 U.S. 167, 221-222 (Frankfurter, J., dissenting)). In fact, in 1969, when the Small Business Administration entered into the loan guarantee whose priority is at issue here, the Fifth Circuit appeared to follow what was then the unanimous rule in the courts of appeals concerning the priority of federal contractual liens. *United States* v. *Roessling*, *supra*, 280 F.2d 933 (C.A. 5, 1960). The Fifth Circuit rejected the choateness doctrine only in June 1971 (*Connecticut Mutual Life Insurance Co.* v. *Carter*, *supra*, 446 F.2d 136, 138-139, certiorari denied, 404 U.S. 857).[44] This was after the SBA had guaranteed O.K.'s note, after O.K. had defaulted on the loan, and after the Bank had assigned its security interest to the SBA (see pp. 4-6, *supra*). The federal govern-

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[43] That law remains overwhelmingly recognized today. The Fifth and Ninth Circuits notwithstanding, the choateness doctrine and the first-in-time rule evidently govern in at least the First, Second, Third, Seventh, Eighth, and Tenth Circuits. See pp. 26-27, *supra*.

[44] The decision of the Ninth Circuit in *Ault* v. *United States*, 432 F.2d 441, see p. 28 n. 32, *supra*, was rendered in September 1970, also after the SBA entered into the loan guarantee here.

ment and other parties [45] stand to lose substantial sums, not only in this case but in hundreds of others, if their justified reliance on the choateness doctrine and the first-in-time rule proves to have been incorrect.

2. The Fifth Circuit's abandonment of the established rule might have been justified if the rule were clearly in error, a departure from prior practice, and not the subject of reliance. See *Monell* v. *Department of Social Services*, *supra*, slip op. 35-41. None of those conditions is true. The Fifth Circuit did not claim otherwise. Rather, viewing "the choateness doctrine independently," it decided that "strong policy reasons militate against its application in this context" (Pet. App. 17a; see also *id.* at 23a).

The court's belief that a new rule would reflect better policy was an insufficient basis for unsettling

[45] For example, in *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F.2d 217 (C.A. 1), the bank whose mortgage loan was insured by the Department of Housing and Urban Development had warranted to HUD, upon assignment of the mortgage loan to HUD, that the mortgage would have priority over all liens recorded after the date the mortgage was filed. Chicago Title Insurance Company, in turn, had insured the obligations of the bank under this warranty. See 568 F.2d at 219. If the choateness doctrine is not applicable, and state law applies instead, these warranties were incorrect; under Maine law, a mechanic's lien would take priority even though recorded after the mortgage, so long as the contract was signed before. See 568 F.2d at 218-219. The First Circuit decided to follow the choateness doctrine, and a petition for certiorari is pending (*sub nom. Hercoform Incorporated* v. *Chicago Title Insurance Company*, No. 77-1611).

the law in this area. But the court's policy arguments are in fact unfounded, and its effort to develop a new federal law of lien priorities on a case-by-case basis would produce results inferior to the rule it rejected.

The court's major policy justification for rejecting the choateness rule in favor of rules derived from state law and the Uniform Commercial Code appears to be its notion that the United States, through the Small Business Administration, acts as a "surrogate commercial lender," or a "quasi-commercial lender," and as such should get no better treatment than a private lender (Pet. App. 17a-18a).[46] The notion is erroneous. The Small Business Administration, like other government lending agencies, is decisively different from an ordinary commercial lender. Government loans, guarantees, and insurance are provided for reasons of national policy, not to make a profit. See the declaration of policy in the Small Business Act, 72 Stat. 384, 15 U.S.C. 631(a); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383 and n. 1; see also *Indian Towing Co.* v. *United States*, 350 U.S. 61, 67-68. And they are provided, usually, only if commercial credit is not available on reasonable terms. See 15 U.S.C. 636(a)(1), quoted at p. 16, *supra;* see also, *e.g.*, 7 U.S.C. 1922(4), 1941(a)(4) (Farmers Home Administration); 42

[46] We have dealt earlier with the court's suggestion that revenues collected from loan repayments are "less central to the proper functioning of the national government" (Pet. App. 19a) then revenues collected from taxes. See p. 22 and n. 22, *supra*.

U.S.C. 3142(b)(4) (Economic Development Administration).[47]

The court of appeals was thus wrong in reasoning that the government should be treated as an ordinary commercial lender because it "enters the commercial credit scheme" with the same "opportunity to evaluate the credit risks" as a private lender (Pet. App. 18a). The government enters only where private lenders do not go. And the choateness rule provides appropriate protection for government loans where the government is the lender of last resort. See *Connecticut Mutual Life Insurance Company* v. *Carter*, *supra*, 446 F.2d at 142-143 (Rives, J., dissenting).[48]

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[47] SBA regulations require proof of refusal of the required financial assistance by the applicant's bank of account and, if the requested assistance is in excess of that bank's normal lending limit, by a correspondent bank as well; when a direct loan is sought, the regulations require proof of refusal by two financial institutions. 13 C.F.R. 120.2(a)(1). In addition, it must appear that the required financial assistance is not available through placement of securities, sale of excess assets, or use of personal credit. 13 C.F.R. 120.2(a)(2).

[48] The Fifth Circuit has characterized the first-in-time and choateness doctrines as a rule that "the government always wins." *United States* v. *Crittenden*, *supra*, 563 F.2d at 688. That is not the case. See *United States* v. *City of New Britain*, *supra*, 347 U.S. at 84, 88 (Court noted that certain tax and water-rent liens were apparently choate, and remanded for determination of priorities); *United States* v. *Vermont*, *supra*, 377 U.S. at 358-359 (tax lien held choate, because summarily enforceable); *Crest Finance Co.* v. *United States*, 368 U.S. 347 (lien held choate where the property to which it attached (accounts receivable), the amount due (face value of note), and the identity of the lienor were all certain). In *United States* v. *Vermont*, *supra*, the Court made it clear that the "absolute priority" (377 U.S. at 358) given the United States under the insolvency statute does not apply to lien contests outside that statute, and rejected the claim that "different standards of choateness apply to federal and state liens" (*id.* at 355).

Nor is there substance in the theory advanced by the court of appeals that the choateness doctrine harms small businesses, contrary to the congressional policy embodied in the Small Business Act, because it ~~lands~~ deters private creditors to shun businesses that might be eligible for SBA loans (Pet. App. 19a). This Court has rejected similar arguments in cases involving R.S. 3466, the insolvency statute. *Small Business Administration* v. *McClellan*, 364 U.S. 446, 453; see also *United States* v. *Remund*, 330 U.S. 539, 544; *United States* v. *Emory*, 314 U.S. 423, 431.[49] In fact, when the federal assistance improves the situation of the borrower, it normally helps the borrower's commercial creditors as well—making them more, not less, willing to lend additional sums. In the present case, for example, the SBA guarantee of the loan from the Bank in February 1969 enabled O.K. to retire outstanding indebtedness, including the $24,893.10 that it owed Kimbell on the April 1968 note, and to pay the amounts it owed Kimbell on

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[49] If the theory were valid, the commercial ostracism that the court posits presumably would have manifested itself in the jurisdictions that follow the choateness rule. The Small Business Administration informs us that its operations in those jurisdictions have encountered no such manifestations. Nor are we aware of any evidence from any other source that supports the court's conjecture.

open account (see p. 5, *supra*). The guarantee also provided needed operating funds for O.K.'s troubled business, all to the benefit of O.K.'s creditors, including Kimbell, which continued to advance credit to O.K.[50]

Even if the established priority rules did cause some commercial lenders to treat loans to small businesses as somewhat riskier than otherwise, an alteration in the priority rules could not be assumed to produce a net benefit for small businesses. The Small Business Administration, like other federal lending or insuring agencies, has only limited resources. It uses a revolving fund as the source of loans and guarantees (15 U.S.C. 633(c)). Inability of the SBA to realize on the security for its loans simply reduces the amount available for future loans, to the detriment of small businesses.

3. The federal rules of lien priority developed by this Court in connection with federal tax liens, and applied by the overwhelming majority of the courts of appeals in connection with federal non-tax liens, form a coherent, well-established, well-understood body of precedent. This law can be readily applied by the courts. And it can be readily utilized in the commercial world to determine in advance the relative rights of the parties to commercial transactions, and to shape the transactions accordingly. The same cannot be said of the new priority rules that the court

[50] The Small Business Administration can, and does, subordinate its liens *by contract* to the claims of other creditors when this is necessary or appropriate. The choateness rule thus provides the SBA with an operational flexibility that the rule of the court below would remove.

below has set out to develop. The court's approach would proceed on a case-by-case basis, selecting from a variety of sources of law, and would produce results virtually impossible to predict and rely on. This judicial regime would be far from conducive to "the expected stability of decision" (*Monell* v. *Department of Social Sciences*, *supra*, slip op. 39).

Thus, once it had discarded the choateness rule, the court in the present case was faced with two difficult issues—"how does a federal court determine when a state lien has arisen so that it may decide whether the state or the federal lien is 'first in time' " (Pet. App. 24a), and whether, under the federal common law that the court was creating, Kimbell's lien for future advances related back to the date of the original security agreement (Pet. App. 26a).[51] On the first question, the court determined that, "[w]hatever the answer * * * may be in other contexts"—which "present problems that we leave for another day" (Pet. App. 24a-25a and n. 15)—here the answer was to look to the Uniform Commercial Code (Pet. App. 24a-25a). Yet, on the second question the court refused to commit itself to the

[51] The court conceded that, having abandoned the choateness doctrine, it was left at large in dealing with this issue:

> Perhaps because of the pervasiveness of the choateness doctrine, we have found no federal case discussing the substantive content of the "first in time, first in right" rule with regard to future advances. Faced with the necessity of fashioning a federal common-law rule because of congressional silence on the subject, we grapple with the problem by first examining the approach taken by the states. [Pet. App. 26a; citations omitted.]

U.C.C. rule, and "grapple[d] with the problem by first examining the approach taken by the states" (Pet. App. 26a-27a). The court identified three rules that had been applied by state courts and narrowed its choice to two, finding it unnecessary to decide between them in this case and leaving "final resolution of this difficult decision for another day" (Pet. App. 26a-28a and n. 18).

The court's mode of decision-making illustrates well the uncertainties arising from any attempt to develop new priority rules through litigation. As the Court of Appeals for the First Circuit said in *Chicago Title Insurance Co.* v. *Sherred Village Associates*, *supra*, in the course of rejecting the approach of the Fifth Circuit here: "We cannot avoid feeling that there is much that we do not know about the equities, effects of various rules, and relative ability of the federal and local lienors to protect themselves," and new rules "could be more equitably and intelligently made after Congressional hearings, rather than after a trial between a limited number of litigants" (568 F.2d at 221 and n. 6).[52]

[52] The Fifth Circuit's decision in *United States* v. *Crittenden*, *supra*, provides a further example of the number of legal issues that can be raised in determining lien priorities, the variety of possible rules that can be applied to each issue, and the difficulty of predicting what rule the court will choose. In *Crittenden*, the court (1) chose the model U.C.C. over state law in fashioning a general rule of priority for mechanics' liens (563 F.2d at 688-689); (2) then followed the model U.C.C. in looking to state law to determine whether a lien had been created (noting that in some circumstances it would follow neither the model U.C.C. nor state law) (*id.* at 690 and n. 20); and (3) finally considered both the U.C.C. case law and the rule of the Federal Tax Lien Act of 1966, and chose the latter, on the question whether the mechanic must have maintained continuous possession of the property subject to the lien (*id.* at 691). The court's ultimate result appears to have given the private lienor a priority under federal law that he would have been denied under state law (see *id.* at 688-689 and n. 17), a result that probably surprised him as much as it did the United States.

4. In addition to shattering "the expected stability of decision," the court below has not justified even the general tendency of the choice of rules it finally arrived at. That tendency favors rules drawn from state law or the model U.C.C.[53] The soundness of this choice is open to question.

One approach considered by the American Bar Association's Special Committee on Tax Liens, in framing the proposed legislation that became the Federal Tax Lien Act of 1966, was to adopt state law as the federal rule—"to put the federal tax lien on the same basis under state law as competing liens." 84 Reports of the American Bar Association 647 (1958). The Committe rejected this approach (*id.* at 648). It did so in response to criticism that "state priority laws were adopted with reference to the competing interests of private claimants, without the federal government in mind—and that, in many cases, the several states exempted themselves from the very

[53] The Ninth Circuit likewise appears to favor state law, although its cases can also be read as adopting the Federal Tax Lien Act of 1966, which, with respect to the facts presented, would have followed state law. See *United States* v. *California-Oregon Plywood, Inc.*, *supra*, 527 F.2d at 689, 691; *Ault* v. *Harris*, *supra*, 317 F. Supp. at 375-376, affirmed and opinion adopted, *Ault* v. *United States*, 432 F.2d 441.

priorities which it is sometimes urged should be applied against the United States" (*ibid.*). The opponents of the state law approach further argued that "the merits of each type of case should be weighed to determine whether it ought to be the federal government or the competing lienor who should have priority," and that "Congress should make the policy decision as to where the federal tax lien should rank in relation to various other categories of competing lien interests" (84 Reports of the American Bar Association at 648).

Instead of the state law approach, the Committee adopted a "selective federal" approach (*id.* at 648). Under this recommendation no person would be granted any lien or other claim that he did not possess under state law, and "federal law would set limits (in each instance tailored to the circumstances of particular types of liens) beyond which such lien would not be recognized as against the federal tax lien" (*ibid.*). This "selective federal" approach was ultimately adopted in the Federal Tax Lien Act of 1966. See, *e.g.*, H.R. Rep. No. 1884, *supra*, at 1-3.

The objections to the state law approach that were made in the context of the tax lien legislation apply equally to the Fifth Circuit's affinity for state law in the context of non-tax liens. State laws on lien priorities were not adopted with federal interests in mind. They may exempt the states themselves from priorities they would apply against the United States.[54] And they do not allow for weighing the

[54] See, *e.g.*, Cal. Revenue and Taxation Code § 2192.1 (West 1978 Supp.); Fla. Stat. § 197.056 (1978); Ohio Rev. Code

federal claim on its merits against the claim of the competing state or private lienor in the contexts of the various categories of liens.

With or without deference to state law, the federal courts are not well-suited to make decisions of this kind. See *Chicago Title Insurance Co.* v. *Sherred Village Associates*, quoted at p. 46, *supra*, 568 F.2d at 221 and n. 6; see also *id.* at 222. As the Court of Appeals for the Second Circuit has said, "* * * the soundest approach would be to look to Congress for resolution rather than to the judiciary," since "Congress has the fact gathering facilities so necessary for an appropriate gauging of the impact of a decision to waive the federal priority for mortgage liens, and Congress is best-suited to make the necessary judgment whether to return a portion of federal revenues to local governments [in the case of competing state and local tax liens]." *United States* v. *General Douglas MacArthur Senior Village, Inc.*, *supra*, 470 F.2d at 679.

The result of congressional consideration would be, probably, a uniform federal rule.[55] In any event, any

§ 715.261 (1976); *Cleveland Metropolitan Housing Authority* v. *Lincoln Property Management Co., Inc.*, 22 Ohio App. 2d 157, 259 N.E.2d 512; 72 Penn. Stat. Ann. § 1401 (1978 Supp.).

[55] Such a rule is established for tax liens by the Federal Tax Lien Act of 1966. If the Fifth Circuit had adopted that Act as the model for a new rule governing federal non-tax liens, it would at least have produced a rule that facilitated the prediction of judicial results and provided some uniformity of treatment for liens arising from loans made in different states under the same federal program. However, we do not believe

congressional decision to incorporate state law would be made only after due consideration of the adverse impact on federal revenues, as well as the adverse effects that the resulting lack of uniformity would have on the administration of federal programs. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367; *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 471-473 (Jackson, J., concurring).[56] Leaving to Congress the decision

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that such a decision would have been appropriate. The federal interests protected by the first-in-time and choateness rules—such as assuring the repayment of loans to federal programs and preventing the states from undercutting federal property interests (see pp. 21-25, *supra*)—should not be waived except by Act of Congress; Congress is the appropriate body to determine whether to relinquish federal revenues in the asserted interest of fairness to competing lienors. No such Congressional action or intent can be inferred, with respect to the issues here, from either the Federal Tax Lien Act of 1966 or the 1958 amendment to the Small Business Act, 15 U.S.C. 646 (see pp. 26-27, *supra*). Moreover, there is no reason to assume that Congress would apply to federal non-tax liens the same policies—let alone the same specific provisions with respect to the various categories of federal liens and competing liens—that it applied to tax liens in the 1966 Act (see p. 32, n. 38, *supra*). Finally, whether or not a new judicial rule would be modeled on a legislative enactment, the need for certainty in commercial law is better promoted when changes in the law are made by actual legislation than when they are made by judicial decision. See *National Bank* v. *Whitney*, *supra*, 103 U.S. at 102.

[56] Recognizing the interest in uniformity, the Fifth Circuit has justified its reliance on the Uniform Commercial Code as a source of federal law by asserting that "the UCC embodies rules of nationwide applicability—all states but Louisiana have adopted it—assuring that federal contractual liens will

whether to modify or even eliminate the first-in-time and choateness rules with respect to federal contractual liens, and the determination of what the new rules should be for the various kinds of federal liens and various kinds of competing liens, would preserve in this area of commercial law both the stability and the uniformity of decision that are threatened by the approach of the court below.

II. RESPONDENT'S LIEN FOR FUTURE ADVANCES WAS INCHOATE AT THE TIME THE FEDERAL LIEN ATTACHED AND THEREFORE IS JUNIOR

For the reasons set forth in Part I, *supra*, we submit that the first-in-time and choateness rules should be applied to determine the priority of federal contractual liens and, in particular, of the Small Business Administration lien in this case.[57] Under

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not be subject to the idiosyncrasies of particular state laws." Pet. App. 25a; see also *United States* v. *Crittenden*, *supra*, 563 F.2d at 689-690. The court overestimates the uniformity that would result from application of the U.C.C. A number of states have amended the model U.C.C. in adopting it, and state court constructions of it vary. The alternative of applying the model U.C.C. provisions, instead of the actual law of the particular state (see *United States* v. *Crittenden*, *supra*, 563 F.2d at 688-689), would not seem conducive to the certainty of commercial affairs within that State. In addition, as the court below recognized (Pet. App. 24a and n. 15), a wide variety of liens, including mechanics' liens and state and local tax liens, are not provided for by the U.C.C.

[57] This general statement is, of course, subject to the exception that a federal statute may provide otherwise, as 15 U.S.C. 646 does with respect to SBA liens competing with state or local property-tax liens (see pp. 33-37, *supra*)—an issue not presented by this case (see note 9, *supra*).

those rules, respondent Kimbell's lien for future advances did not become choate until after the SBA lien had attached, and the SBA lien is therefore first in time and entitled to priority in the proceeds being held in escrow by the Republic National Bank of Dallas.

A. The court of appeals was correct in ruling (Pet. App. 26a) that the SBA's security interest in the property of O.K. Super Markets attached when the Republic National Bank's security agreement was filed, in February 1969. See *United States* v. *Eklund*, 369 F. Supp. 1052, 1054-1055 (S.D. Ill. 1972); cf. *Small Business Administration* v. *McClellan*, *supra*, 364 U.S. at 450. At that time the government's obligation to guarantee 90 percent of the Bank's loan pursuant to its agreement with the Bank—and to pay the Bank 90 percent of the loan in the event of default, as provided in that agreement—was fixed.[58]

The future advances at issue here were made after that February 1969 date. (They consisted of Kimbell's continuing to extend credit to O.K. on open account, after O.K. had used the proceeds of the Bank's February 1969 loan to pay off its 1968 note to Kim-

[58] The participation of the SBA appeared from the face of the note (App. 70-71), though not from the security agreement and financing statement filed with the Secretary of State. Since Kimbell was fully aware of the SBA's participation in the loan (see *supra*, pp. 3-4; App. 61-64), it cannot claim that the lack of reference to the SBA in the security agreement and financing statement precluded the SBA's interest from attaching, at least in relation to Kimbell's lien, when the security agreement was filed.

bell (see p. 5, *supra*.)) The present case is therefore controlled by *United States* v. *R. F. Ball Construction Co., Inc.*, 355 U.S. 587 (*per curiam*). The Court there "rejected as inchoate an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer-debtor." *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 91. In *R. F. Ball*, sums due the contractor-taxpayer under a construction contract were assigned to a surety as security for any future indebtedness of the contractor to the surety arising under that contract or any other (374 U.S. at 91). After the filing of the federal tax lien against the contractor, the surety made advances to complete another contract of the taxpayer, as it was obligated to do under its bond issued on that contract, and the contractor thereby became indebted to the surety. This Court held that the surety's interest securing these later payments was "inchoate and unperfected" at the time the federal tax lien was filed and was therefore junior to the tax lien (*ibid.*); see *United States* v. *R. F. Ball Construction Co., Inc.*, *supra*, 355 U.S. at 588-589 (Whittaker, J., dissenting).[59]

So, here, the future advances were made only after the federal lien attached. They were "uncertain in amount, and yet to be incurred and paid," in Febru-

[59] See also Rev. Rul. 56-41, 1956-1 Cum. Bull. 562, relating to advances of money by a mortgagee under an open-end mortgage, cited with approval in *United States* v. *Pioneer American Insurance Co.*, *supra*, 374 U.S. at 91-92, n.10. The Internal Revenue Service there ruled that a lien to secure advances by the mortgagee did not have priority over an intervening Federal tax lien.

ary 1969—Kimbell might or might not make them, having no obligation to do so—and Kimbell therefore held "merely a *caveat* of a more perfect lien to come, *New York* v. *Maclay*, 288 U.S. 290, 294." *United States* v. *Pioneer American Insurance Co.*, *supra*, 374 U.S. at 91.

B. But even if the SBA's lien did not attach until the note was assigned to the SBA by the Bank and this assignment was recorded, on January 21, 1971 (see pp. 5-6, *supra*), the SBA's lien is still senior to Kimbell's lien for the future advances.

When the Bank's assignment to the SBA was filed, on January 21, 1971, Kimbell had filed suit in state court on its claimed advances to O.K. (see p. 5, *supra*). But Kimbell's claim was not enforceable by summary proceedings, and the amount of its valid claim was open to dispute by O.K. until Kimbell reduced the claim to judgment on February 4, 1972 (see Pet. App. 23a-24a, n. 14; p. 6, *supra*; Pet. App. 33a n. 2). The amount of Kimbell's lien therefore was not certain, and the lien therefore was not choate, on January 21, 1971. *United States* v. *City of New Britain*, 347 U.S. 81; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010 (*per curiam*), 1010-1011 (Douglas, J., dissenting) (mechanic's lien held inchoate by the Court even though contract was completed, mechanic's lien was recorded in specific amount on specific property, and mechanic had instituted suit before federal lien attached). See

also *United States* v. *Vorreiter*, 355 U.S. 15; *United States* v. *Colotta*, 350 U.S. 808.[60]

In these circumstances, the SBA's lien is entitled to priority as the lien "first in time."[61]

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[60] These cases refute the suggestion of the court below (Pet. App. 23a-24a, n.14) that Kimbell's lien may have been choate before January 15, 1971, because Kimbell had "terminated extensions of credit" to O.K. before that date. In *White Bear Brewing Co.*, *supra*, the contract was completed and the mechanic had instituted suit to enforce his lien, but the mechanic's lien was nonetheless held to be inchoate, presumably because the amount actually due remained open to dispute, as in this case. The court below relied on *Crest Finance Co.*, *supra*, 368 U.S. 347, but that case is distinguishable because there the amount due was established by the face amount of the lienor's note.

With respect to respondent's claim for attorneys' fees (see pp. 5-6 and n. 7, *supra*), since its lien for the future advances that it recovered in the state court proceeding is not prior to the SBA's claim, its asserted lien for the attorneys' fees allowed in that proceeding cannot be. See *United States* v. *Liverpool & London Insurance Co.*, 348 U.S. 215, 217. The amount of fees was not fixed until the court's judgment setting the fees was entered, which did not occur until February 4, 1972 (App. 29). (Tex. Civ. Stat. Art. 2226 (1971) provides for "a reasonable amount as attorney's fees" in suits on a contract. The security agreement provided, in the event of default, "a reasonable attorney's fee not exceeding 10 percent of the unpaid principal and interest" (App. 17).) See *United States* v. *Pioneer American Insurance Co.*, *supra*, 374 U.S. at 87; cf. *United States* v. *Equitable Life Assurance Society of the United States*, 384 U.S. 323, 329. The lien for attorneys' fees therefore was not choate when the SBA's lien attached.

[61] If the court below had adopted the rules of the Federal Tax Lien Act of 1966 (see p. 49, n. 55, *supra*), it probably would have found that the SBA's lien had priority. The Act gives priority to future advances made pursuant to a written financing agreement only if they are made within 45 days

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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of the filing of the tax lien and before receipt of actual notice of that filing. 26 U.S.C. 6323(c)(2)(A). If the date of the Bank's filing of the security agreement and financing statement, February 18, 1969, is taken as the date when the SBA's lien attached, as the court below correctly held (Pet. App. 26a; see p. 52, *supra*), Kimbell would lose under the test of the 1966 Act for two reasons: it had actual notice of the SBA's interest in the loan at the time of the Bank's filing (see note 58, *supra;* App. 61-64), and it made at least some of its advances more than 45 days after that date (App. 47, 48-49, 61-64).

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